Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

October Term, 1995

MARGARET ATCHLEY,

Petitioner,

v.

BILL JACK SMITH and
THE CITY OF POTEAU, OKLAHOMA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States District Court has jurisdiction to consider an action brought pursuant to 42 U.S.C Section 1983 against a municipal police officer and a municipality, for damages arising out of a warrantless search and seizure in violation of the Fourth and Fifth Amendments to the Constitution of the United States where (1) the property seized was U.S. Currency; (2) 21 days following the seizure, municipal officials and officers assisted the Drug Enforcement Agency to seize the funds; and (3) the plaintiff filed a petition for remission, but did not file a cost bond and demand trial in U.S. District Court as against the Drug Enforcement Agents.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

MARGARET ATCHLEY, Petitioner

v.

BILLY JACK SMITH and
THE CITY OF POTEAU, OKLAHOMA, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT
OF APPEALS FOR THE TENTH CIRCUIT

The Petitioner, Margaret Atchley, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled proceeding on June 5, 1995.

OPINIONS BELOW

The opinion and judgment of the Tenth Circuit Court of Appeals, dated June 5, 1995, was not reported. A copy of the opinion is reproduced in the Appendix at p. 1a. The opinion and judgment of the Magistrate for the United States District Court for the Eastern District of Oklahoma was not reported. A copy of that opinion is reproduced in the Appendix at p. 9a.

JURISDICTIONAL STATEMENT

On June 5, 1995, the Tenth Circuit Court of Appeals entered judgment and opinion affirming the action of the United States District Court for the Eastern District of Oklahoma which dismissed petitioner's 42 U.S.C. Section 1983 claim for lack of jurisdiction. No petition for re-hearing was sought.

The jurisdiction of the Court to review the judgment of the Tenth Circuit Court of Appeals is invoked pursuant to 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Amendment IV.

Constitution of the United States, Amendment V.

42 U.S.C. Sec. 1983

28 U.S.C. Sec. 1343(a)

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26 U.S.C. Sec. 7325(3)

These provisions are reproduced, verbatim, in the Appendix commencing at p.

STATEMENT OF THE CASE

Margaret Atchley filed an action in the United States District Court for the Eastern District of Oklahoma against Poteau Police Officer Billy Jack Smith and the City of Poteau, Oklahoma. invoking 42 U.S.C. Sec. 1983. She alleged that the Defendants had violated rights guaranteed to her by the Fourth and Fifth Amendments to the Constitution of the United States.

Atchley alleged that she was stopped without probable cause, that her vehicle was seized and searched without warrant, or probable cause, and in violation of the written policy of the City of Poteau concerning vehicle impoundment, that the seizure of her funds by the City of Poteau offended the Fourth Amendment; that two subsequent "drug dog" sniffs further offended the Fourth Amendment; and, that the failure of the City of Poteau to deliver the funds to an Oklahoma Court offended the Fifth Amendment.

Atchley was stopped by Officer Smith as she approached a traffic signal to make a left turn. Smith stated that she was stopped because she was driving in the center of two southbound lanes of traffic. Smith could not say whether or not the vehicle turn signals were illuminated to signal a left turn.

Atchley completed the left turn, pulled to the curb and stopped in a manner which did not impede vehicular

traffic. She was requested by Smith to accompany a second officer to the Police Station for a breath test, a journey which took approximately one minute to complete. Upon arrival at the station, the other officer heard Officer Smith call for a tow truck. Atchley's vehicle was loaded with bar supplies. Before the tow truck arrived, and before Atchley was given a breath test, Smith searched the trunk of the car and found bank bags secreted under "a bunch of stuff".

Atchley was strip searched and, after some delay, was given a breath test. Smith shortly arrived at the station with the bank bags, the bags were opened, and found to contain $49,829.45 in coin and currency and $3,500.00 in checks. Smith and two other officers took two or more hours to count the currency utilizing the counter in the police station for that purpose.

The City of Poteau has a "drug dog." While Smith and others were counting the currency, the drug dog was brought to the station, but the officer in charge of the dog stated that the dog did not sniff the currency and did not sniff Atchley's vehicle. Atchley found dog hairs on the interior of her vehicle when it was returned to her on the following day.

After the currency was counted, it was placed in an office where the Poteau Police Department stores contraband narcotics. That evening, the Chief of Police removed the currency from the police station and placed

the money in a safe at City Hall. The following day, the currency was taken to a bank where it was counted by, among others, the wife of the Chief of Police, and ultimately placed in a lock box. There are no records with respect to the lock box. The Chief of Police stated the lock box was loaned to the police department.

Atchley was released on bond later in the morning of October 28th and her vehicle and all of her property, except the currency, was returned to her. She was advised by the Chief of Police that the currency was being held for investigation by the IRS. The IRS did investigate and declined to take any action with respect to the currency.

Fourteen (14) days later, the police department conducted, without a warrant, a test at the bank. The drug dog was brought to the bank and sniffed through the vault with a resultant announcement by the dog's handler that the dog had hit on the box in which the currency was located.

The Chief of Police knew that it was the policy of the DEA to return to cities eighty percent of any funds seized by the DEA with substantial assistance from City officers. The DEA was contacted and on November 19th, twenty-one (21) days after the City had seized the currency, and without a warrant, the City drug dog was again taken to the bank and, in the presence of a DEA agent and City Officers, again sniffed the vault and the

handler again announced that the dog had "hit" on the box where the currency was stored.

The DEA agent took possession of the currency and gave notice of forfeiture. Atchley filed a Petition for Remission, alleging she was without funds to post a bond, the DEA administratively forfeited $49,829.45. $40,000 of which was returned to and is still held by the City of Poteau.

Atchley brought the instant action against Smith and the City of Poteau. The U.S. Magistrate for the Eastern District of Oklahoma held that the District Court was without jurisdiction to consider a 42 U.S.C. Sec. 1983 action against the police officer and the City because Atchley's exclusive remedy was limited by 26 U.S.C. Sec. 7325(3) and the action was dismissed for lack of jurisdiction.

The Tenth Circuit Court of Appeals recognized the distinction between an action brought pursuant to 26 U.S.C. Sec. 7325(3) (an action limited to return of the seized funds) and an action against wrongdoers acting under color of state law, 42 U.S.C. Sec. 1983. The Court further noted that a Sec. 7325(3) action would not afford Atchley the opportunity to claim damages from the present defendants or to recover attorney's fees.

The Court then reasoned that Atchley had a right to maintain a Sec. 7325(3) action; that had she elected so

to do, she could have brought a separate Section 1983 action against the present defendants; and, that her failure to initiate the Sec. 7325(3) claim foreclosed the right to challenge the conduct of the present defendants in district court. The decision of the Magistrate was affirmed and this petition for certiorari follows.

REASONS FOR GRANTING THE WRIT

1. The decision of the Tenth Circuit is contrary to the Unanimous decision of this Court in *Haring v. Prosise, 426 U.S. 306, 76 L.Ed2d 595, 103 S. Ct. 2368.*

2. The holding by the Tenth Circuit that a Sec. 1983 action against state entities must be preceded by a Sec. 7325(3) suit is without precedent and contrary to the principles announced in *Wilder v. Virginia Hospital Ass'n., (1990) 496 U.S. 498, 110 L.Ed2d 455, 110 S. Ct. 2510.*

This case is complicated by the fact that the Magistrate dismissed the District Court action for lack of jurisdiction while the Tenth Circuit affirmed the dismissal on an entirely different ground, i.e. Atchley could have contested the forfeiture and her failure so to do deprived her of the opportunity to maintain the instant action, even though the Tenth Circuit recognized that the relief available in the forfeiture action was inadequate and did not provide a remedy as against the named defendants.

This Court has unanimously rejected the "could have litigated" philosophy. In *Haring v. Prosise, supra,* the Sec. 1983 plaintiff was a person who had entered a plea of guilty to manufacturing a controlled substance. After sentencing, Prosise commenced an action against Haring alleging that his house was searched in violation of the Fourth Amendment. This Court rejected contentions that the guilty plea admitted the validity of the search and that the guilty plea waived the right to contest the search. The guilty plea, in the context of the Fourth Amendment claim, was deemed "irrelevant".

Similarly, in *Wilder v. Virginia Hospital Association, supra,* the state of Virginia contended that access to Sec. 1983 was foreclosed because an administrative remedy was available to redress plaintiff's grievances. To prohibit access to Sec. 1983, this Court held, the administrative remedy must be sufficiently comprehensive to allow private judicial or administrative enforcement. Additionally, the legislation authorizing such action, must ". . . demonstrate Congressional intent to preclude the remedy of suits under Sec. 1983". 496 U.S. at 521. The confusion in this case arises because both the Magistrate and the Tenth Circuit refused to give effect to 42 U.S.C. Sec. 1983 and refused to recognize the distinction between a search and a seizure. This is not an effort to re-litigate the forfeiture. That opportunity was lost when Atchley failed to post the required $2,500.00 bond and contest the validity of the forfeiture.

That circumstance, however, is not a defense to the City and its Officer for wrongfully seizing Petitioner's funds.

"A seizure of property occurs when there is some meaningful interference with an individual's possessory interest in that property." *U.S. v. Jacobsen, 466 U.S. 109, 113, 80 L.Ed2d 85, 94, 104 S. Ct. 1652.* The length of detention, alone, in the absence of probable cause precludes the conclusion that a seizure was reasonable. *U.S. v. Place, 462 U.S. 696, 709, 77 L.Ed2d 110, 122, 103 S. Ct. 2637.*

In this case, Respondents seized Petitioner's funds not later than 2:15 a.m. on October 28, 1991. Neither the funds, the bank bags in which the funds were found, or Petitioner's vehicle were subjected to a drug dog sniff on October 28, 1991, a procedure which could have been arguably justified.

Instead the currency was removed from the bank bags, exposed to possible contamination by counting on the counter in the police station, exposed to further possible contamination by placement in police containers, exposed to further possible contamination by storage in a room where contraband narcotics were kept, exposed to further possible contamination by removal to a safe at Poteau City Hall and exposed to further possible contamination by counting and recounting at the Bank.

Fourteen days later, without a warrant, the Respondents conducted a drug dog test at the bank. Four days later a second test which resulted in the DEA forfeiture was conducted, again without a warrant.

Petitioner is not a person who police suspected of involvement in drugs. She has no record. The only suspicious items found in her possession were two caffeine pills available over the counter at her drug store and the currency.

The problems inherent in a drug dog sniff of currency are discussed intelligently in *U.S. v. $80,760.00 In U.S. Currency (N.D. Tex., 1991) 781 F. Supp. 462, 475-478.*

Considering the fact that Petitioner's currency was in the possession of the Respondents for 14 days before a drug dog sniff was initiated, there can be no serious doubt that Petitioner has a valid Sec. 1983 claim against Respondents for the Fourth Amendment violation. *U.S. v. Place, supra.*

CONCLUSION

Petitioner has stated a valid claim under 42 U.S.C. Sec. 1983 against Respondents. The subsequent forfeiture by the DEA is not relevant to the claim and does not establish waiver, collateral estoppel or any other defense to the claim.

The Petition for certiorari should be granted.

Respectfully submitted,

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August _____, 1995

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

MARGARET ATCHLEY,

Plaintiff-Appellant,

v.

No. 94-7037
(D.C. No. CV-93-378)
(E.D. Okla.)

BILLY JACK SMITH and
THE CITY OF POTEAU,
OKLAHOMA,

Defendants-Appellees.

ORDER AND JUDGMENT*

Before HENRY and SETH, Circuit Judges, and KANE, District Judge**.

Margaret Atchley appeals from a district court's order dismissing her claim against Billy Jack Smith and the City of Poteau, Oklahoma for lack of jurisdiction. Appellant alleges, under 42 U.S.C. § 1983, violation of her Fourth and Fifth Amendment rights. Because the basis of Appellant's claim involved the seizure and subsequent forfeiture of property, and Appellant had contested the propriety of the forfeiture in administrative forfeiture

proceedings, the magistrate judge concluded that she was precluded from bringing the instant action in the district court. *See* 26 U.S.C. § 7325; 19 U.S.C. § 1609(b).

Appellant was detained the morning of October 28, 1991 by Appellee Smith after he noticed that she was driving in the center of two lanes of traffic. She was arrested for suspicion of driving under the influence, which was confirmed at the police station where Appellant failed a breath alcohol concentration test. Officer Smith, who remained at the vehicle after Appellant was escorted to the police station, conducted an inventory of the vehicle prior to the arrival of a tow truck. The inventory revealed $49,829.45 in United States currency. There was also approximately $3,500 in checks, bringing the total amount present in Appellant's vehicle to $52,175.54. In addition, Officer Smith discovered a loaded firearm in the vehicle. Appellant was ultimately charged with driving under

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*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 29, 1993. 151 F.R.D. 470.

**The Honorable John L. Kane, Jr., United States District Judge for the District of Colorado, sitting by designation.

the influence and transporting a loaded firearm.

On October 29, 1991 the Oklahoma State Bureau of Investigations was contacted regarding the currency, and it in turn contacted the I.R.S. and the D.E.A. The I.R.S. did not institute forfeiture proceedings, but the D.E.A. seized the money on November 19 following the City of Poteau's drug dog identifying the currency as being narcotic tainted. It is not disputed that the D.E.A. provided proper notice to Appellant regarding its seizure of the funds, including publication in USA Today for three consecutive weeks and notice of seizure dated December 16, 1991 to which Appellant acknowledged receipt. *See* 19 U.S.C. § 1607.

At this point Appellant, represented by an attorney, filed a Petition for Remission or Mitigation. This petition was denied with the declaration of forfeiture on January 31, 1992. By electing to pursue this avenue Appellant declined the opportunity to remove the forfeiture proceeding to the district court by filing a timely claim and cost bond. *See* 26 U.S.C. § 7325. Appellant contends that this decision does not affect the district court's jurisdiction over a § 1983 claim challenging the underlying conduct which led to the seizure as being unconstitutional. Appellees argue that this circuit has established that the legality of a seizure may be examined in forfeiture proceedings, and that by electing not to pursue her claim in district court Appellant

confined her claims to the forfeiture proceeding. *See Frazee v. I.R.S., 947 F.2d 448, 45Q (10th Cir.); Floyd v. United States, 860 F.2d 999, 1004* (10th It is this issue which we address.

In order to clarify the opportunity claimants of seized property have with regard to removal of judicial forfeiture proceedings to district court, a brief account of the relevant statutory provisions is appropriate. Following the initial aforementioned publication of notice, a claimant has twenty days to file a claim and cost bond. 19 U.S.C. § 1608. A timely filing halts the administrative forfeiture and the matter is transferred to the appropriate United States attorney, who then commences judicial forfeiture proceedings. 26 U.S.C. § 7325(3). *See also* Floyd, 860 F.2d at 1004. If, however, no such claim is filed, the property is administratively forfeited at the conclusion of the twenty-day period. 19 U.S.C. § 1609. Further, a declaration of forfeiture pursuant to § 1609 has the same force and effect of a final order in a district court judicial forfeiture proceeding. 19 U.S.C. § 1609(b). These provisions are relatively straightforward, and were explained in the notice of seizure sent to Appellant on December 16, 1991. Based upon the statutory authority outlined above and our decisions in Frazee and Floyd, there can be no doubt that by electing to challenge the administrative forfeiture Appellant has precluded her right to directly challenge the forfeiture in the district court at a later time.

Appellant contends, however, that the instant action is not a direct challenge on the forfeiture, but rather an independent constitutional challenge of the actions of the Appellees which resulted in the seizure. Appellant maintains that such a claim is precisely what is contemplated by § 1983 and that participation in a forfeiture proceeding, in which the opposing parties are entirely different, did not bar this instant action under the doctrines of res judicata, collateral estoppel, or waiver. Finally, Appellant argues that because this is a claim under § 1983, rather than a petition in equity for return of property pursuant to Rule 41(e), that the Floyd and Frazee cases are entirely distinguishable and should not govern the outcome of this action.

In our view, the inquiry must turn on whether the available procedures to which Appellant was entitled, whether or not she elected to pursue them, afforded her the opportunity to present claims of the nature asserted in the present action. As stated previously, Appellee points out that Frazee establishes that "the legality of a seizure may be tested in a judicial forfeiture." *Frazee, 947 F.2d at 450; Floyd, 860 F.2d at 1004. See also In re Harper, 835 F.2d 1273 (8th Cir.)* (movant cannot pursue equitable remedy when he did not challenge forfeiture at underlying forfeiture proceeding). While we recognize that the legality of the seizure can play a prominent role in determining whether forfeiture of property is appropriate,

and is thus properly tested in that forum, we cannot agree with Appellees that a judicial forfeiture proceeding would provide Appellant the opportunity to present the types of claims asserted in the instant action. While Appellant certainly could have raised the issue of the seizure's legality in the forfeiture proceeding, that forum would not provide the opportunity for Appellant to claim damages against the immediate Appellees occasioned by alleged violations of her constitutional rights or attorney's fees relating to recovery based upon such violations. *See generally Wood v. Several Unknown Metro. Police Officers, 835 F.2d 340 (D.C. Cir.)* (forfeiture proceedings preclude future actions for replevin, yet a viable claim for damages may exist separate and distinct from the replevin plea). Because not all claims for which § 1983 provides an opportunity for redress are available to a claimant in an administrative forfeiture procedure, we must exercise caution in this regard to ensure that a plaintiff who alleges the violation of constitutional rights is not denied a forum in which to do so.

With this in mind, we again turn to the provisions available to Appellant by which she could have obtained jurisdiction in the district court. The magistrate judge found this opportunity dispositive, holding that Appellant was "precluded from bringing the instant action based upon her failure to file a claim and cost bond pursuant to the procedure outlined in the administrative forfeiture process." Trial Court Order, February 1, 1994. We agree

with the magistrate judge's determination, yet wish to clarify our holding in light of our concerns discussed above regarding Appellant's opportunity to present her claims against those parties whom she alleges violated her constitutional rights.

As we stated above, there are certain causes of action cognizable under § 1983 that are not able to be raised in forfeiture proceedings. Nonetheless, under the facts of this case, it cannot be said that Appellant had no opportunity to present these claims in a § 1983 action. Indeed, had she elected to pursue the forfeiture in district court as she clearly had the right to do, there would have been no jurisdictional difficulties at all regarding her § 1983 claim. In that scenario, Appellant could have challenged the forfeiture and brought separate claims against the Appellees herein. She did not do that, however, and we conclude that by electing to challenge the administrative forfeiture by petition for remission or mitigation, she foreclosed the right to challenge the seizure or the underlying conduct leading to the seizure in district court.

Appellant additionally asserts a variety of arguments regarding the constitutionality of the actions of the Appellees underlying the seizure of the property. In light of our holding above, we need not reach these issues.

Based upon the foregoing, the decision of the United Stares District Court for the Eastern District of Oklahoma is AFFIRMED.

Entered for the Court

Oliver Seth
Circuit Judge

94-7037, Atchley v. Smith
JUDGE HENRY, concurring

Although I do not read the majority opinion as opposing this point, I write separately to emphasize that, where the defendant was not a party to the forfeiture proceeding, a plaintiff with an independent cause of action arising from an unconstitutional arrest should not be barred from bringing the action merely because property seized in the arrest has been forfeited. *See Wood v. Several Unknown Metropolitan Police Officers, 835 F 2d 340, 344 (D.C. Cir. 1987).*

However, Ms. Atchley is not such a plaintiff. It appears to have been a serious mistake not to contest the seizure in the proceeding designed expressly for that purpose. As I understand it, this action is essentially an attempt to rectify that mistake by relitigating the forfeiture. To the extent that other damages have been alleged, they arise from what the record reveals to have been a completely unremarkable--and constitutional--stop, arrest, and search. Summary judgment in favor of the defendant-appellees was warranted on the merits. I therefore concur in the order and judgment.

IN THE UNITED STATES DISITRICT COURT FOR THE

EASTERN DISTRICT OF OKLAHOMA

MARGARET ATCHLEY,
Plaintiff,

v. No. 93-378-P

BILLY JACK SMITH and the CITY OF POTEAU, OKLAHOMA,

Defendants .

ORDER

This action is before the court pursuant to Fed.R.Civ.P. 12(h)(3). Plaintiff brings the instant case for alleged violadons of her civil rights under 42 U.S.C. §1983. Specifically, Plaintiff claims a violation of her Fourth Amendment rights because of an improper search of her vehicle, and a violation of her Fifth Amendment rights for a deprivation of property without due process of law.

BACKGROUND

Based upon the record and proceedings at the Pretrial Conference the court finds that Plaintiff was stopped at approxamately 2 a.m. on October 28, 1991, by Defendant Smith while driving her automobile on a street in Poteau, Oklahoma. Officer Smith requested Plaintiff to take a breath test; Plaintiff agreed to do so, and Poteau Officer Seale escorted Plaintiff to the police station for such test. After Plaintiff was taken to the police station, Defendant Smith conducted an inventory of Plaintiff's vehicle before the tow truck arrived to take Plaintiff's automobile to the impound lot. Plaintiff contends that the inventory of her vehicle amounted to a search, which was conducted contrary to the Defendants' own policy, and in violation of the Fourth Amendment. The inventory revealed $52,175.54, of which apprordmately $3,500.00 was in checks, in the hatchback of the Plaintiff's vehicle.

After Plaintiff's alcohol breach test revealed her previous driving of her vehicle to be in violation of the law, Officer Smith issued citations to Plaintiff for "DUI" and transporting a loaded firearm. Plaintiff was searched and detained at the police station until such time as she could be taken to the LeFlore County jail. Defendants contend that Sergeant Smith turned over the money to Detective Jeny Tamplin, and that the money was stored in the Poreau City Hall safe over night. The following day, the money was taken to the Poteau State Bank and deposited in the bank's vault.

Oklahoma State Bureau of investigations Agent Bob Almon was contacted on October 29, 1991. Agent Almon contacted the DEA and IRS. The IRS declined to institute forfeiture proceedings. However, the DEA seized the money on November 19, 1991 after the Poteau Police Department's drug detection dog positively identified the currency as being tainted by narcotics. The DEA records indicate that the DEA seized $49,829.45.

It is undisputed that the DEA transmitted a Notice of Seizure to the Plaintiff on December 16, 1991 and Plaintiff acknowledged receipt of the DEA Notice of Seizure on December 23, 1991. The DEA Notice of Seizure was also properly published in the USA Today newspaper.

Plaintiff was represented by an attorney and chose to file only a Petition for Remission or Mitigation. Plaintiffs Petition was denied with the Declaration of Forfeiture on January 31, 1992.

DISCUSSION

The case law is clear that the procedure outlined by Congress in 26 U.S.C. §7325 for removing an administrative forfeiture proceeding to the district court, upon filingwith the agency a timely claim and a $250.00 bond, is the only means of bringing the merits of a

pending forfeiture before the district court.(1) By exhausting that remedy a claimant obtain a plenary hearing in the District Court and a judicial review of the validity of the forfeiture.

In the instant case the Plaintiff acknowledges that the Secretary complied with the notice requirements of §1607 and that the forfeiture proceeding did not suffer any defects in notice. Plaintiff argues, however, that the remedy afforded Plaintiff through the forfeiture process should nor be the only remedy allowed. In support of this contention Plaintiff argues, citing in re Harper, 835 F.2d 1273 (8th Cir. 1988), that constitutional issues concerning the propriety of the forfeiture can also be addressed in the Court of Claims.

1.) The process works as follows. If the value of a seized article does not exceed $100,000, the appropriate customs officer is required to publish for three successive weeks a notice of seizure and intent to forfeit the property. 19 U.S.C §1607. After the first publication of notice, a claimant has twenty days to file a claim and cost bond. 19 U.S.C. §1608. If no such filing occurs, the property is administratively forfeited at the end of the twenty days. 19 U.S.C. §1609. A timely filing, however, stops the administrative forfeiture, 21 C.F.R. §1316.76(b), and the matter is then transferred to the appropriate United States attorney for the institution of judicial forfeiture proceedings. 21 C.F.R. 1316.78.

It is true that claimants can challenged the validity of the forfeitue proceedings when the administrative proceeding itself was conducted without adequate notice so that a claimant is unable to comply adequately with the provisions of 19 U.S.C. §1608. When notice is inadequate, the claimant can also attack the constitutionality of summary forfeiture in federal district court.(2) However, in the instant case, as previously discussed, Plaintiff concedes she was given proper notice. Further, Notice was published as required by the statute. At this point, instead of filing a bond, Plaintiff chose to file a Petition for Remission or Mitigation. The "election to challenge administrative forfeiture by petition for remission, rather than by posting a bond prior to judicial challenge, binds plaintiff exclusively to available administrative remedies. See, Frazee v. Internal Revenue Service, 947 F.2d 448 (10th Cir. 1991); Floyd v. United States, 860 F.2d 999 (10th Cir. 1988); In re Harper, 835 F.2d 1273 (8th Cir. 1988), and Noel U.S., 16 Cl. Ct. 166 (1989). As noted the Tenth Circuit "the legality of a seizure may be tested in a judicial forfeiture." Frazee v.

2.) See e.g., Gulp v. United States, 523 F.2d 557 (8th Cir. 1975), citing, Menkarell v. Bureau of Narcotics, 463 F.2d 88 (3rd Cir. 1972); Melendez v. Shultz, 356 F.Supp. 1205 (D.Mass.)(three judge court), appeal dismissed for want of jurisdiction, 486 F.2d 1034 (2d Cir. 1973); Jaekel v. United States, 304 Supp. 993, 998 (S.D.N.Y. 1969).

Internal Revenue Service, 947 F.2d 448 (IOth Cir. 1991), citing Floyd, supra at 1004.

Once the DEA initiates administrative forfeiture proceedings, the district court is divested of jurisdiction. United States v. Aguilar, Nos. 93-1412 and 1413, 1993 U.S. app. LEXIS 30187, at *5 (7th Cir. November 16, 1993). Because Plaintiff did not file a claim and cost bond within the allotted time, this court did not gain Jurisdiction and a decree of forfeiture was entered. Therefore, the court finds that Plaintiff is precluded from bringing the instant action based upon her failure to file a claim and cost bond pusuant: to the procedure outlined in the administrative forfeiture process. 19 U.S.C. §§1607-1609, and 21 C.F.R. 1317.76(b) and 21 C.F.R. §1316.78.

Accordingly, Plaintiffs case is dismissed for lack of jurisdiction.

IT IS SO ORDERED this 1st day of February, 1994.

James H. Payne
UNITED STATES MAGISTRATE JUDGE

AMENDMENT 4 TO THE UNITED STATES CONSTITUTION

Unreasonable searches and seizures.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT 5 TO THE UNITED STATES CONSTITUTION

Criminal actions - Provisions concerning - Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be tweice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

19 USCS § 1607, n 2 CUSTOMS DUTIES

K. Raw Mink Skins (1964, SD NY) 227 F Supp 425.

3. Notice

Although due process may not demand actual notice in every case, it does forbid use of method of notice which is not reasonably calculated to reach those who could easily be informed by other means readily at hand; where plaintiff's car is forfeited to United States by proceedings under 19 USCS § 1607, and name and address of registered owner is readily available from motor vehicle registration authorities, there are no reasons of necessity compelling resort to notice by publication in lieu of notice more likely to be effective, and where record discloses that agency practices attitude of concealment rather than enlightenment, forfeiture proceedings do not comport with due process. Menkarell v. Bureau of Narcotics (1972, CA3 NJ) 463 F2d 88.

Although requirement of notice by publication, as prescribed by 19 USCS § 1607, may be inadequate to afford due process with respect to persons such as registered owners of seized vehicles whose identities and addresses are known or easily ascertainable and whose legally protected interests are directly affected by proceedings in question, where owner receives actual notice of proceeding, he has no standing to raise claim

that constructive notice is insufficient. Wiren v Eide (1976, CA9 Wash) 542 F2d 757

Under 19 USCS §1607, administrative forfeiture mechanism begins with publication of notice; because of importance of notice, forfeiture was not instituted when agent merely forwarded papers: notice informs interested party of government's intent to seek forfeiture and begins statutory period in which administrative forfeiture will either be completed or Will Proceed to judicial forfeiture. Floyd v United States (1988, CA10 Colo) 860 F2d 999

Administrative forfeiture of 6 Mercedes seized by Drug Enforcement Administration is vacated for failure to provide notice to car owner where DEA sent registered letter to what it knew was out-of-date address, published notice in newspaper, failed to provide any notice to owner's counsel despite prior request to do so, and there is no evidence that owner had actual notice of proceedings; mere publication notice does not satisfy due process requirements of 19 USCS § 1607. Gutt v. United States (1986, WD VA) 641 F Supp 603.

4. Mitigation of remission

When vehicles are seized for forfeiture or as security, under statutory scheme which incudes 19 USCS § 1607, action on petitions for mitigation or remission should be required within 24 hours, with notice of charge, and with opportunity to file written response and to make oral appearance and, if requested, some kind of hearing on probable cause for detention before officer other than one making charge should be provided within 72 hours

if petition is not granted in full. Lee v. Thornton (1976, CA2 Vt) 538 F2d 27.

In action by owner of vehicle to recover value of vehicle seized by Customs officials and summarily forfeited notice to owner of administrative forfeiture hearing publication is not sufficient where owner's name and address are known, and failure to mail owner such notice is violation of due process, even though publication of notice is made in accordance with 19 USCS § 1607, and owner's filing of petition for remission under 19 USCS § 1618 is not substitute for being given notice of forfeiture proceeding, in that remission route affords no opportunity for hearing and is matter of administrative grace. Winters v. Working (1980, WD Tex) 510 F Supp 14.

§1608. Seizure; claims; judicial condemnation

Any person claiming such vessel, vehicle, aircraft, merchandise, or baggage may at any time within twenty days from the date of the first publication of the notice of seizure file with the appropriate customs officer a claim stating his interest therein. Upon the filing of such claim and the giving of a bond to the United States in the penal sum of $5,000 or 10 percent of the value of the claimed property, whichever is lower, but not less than $250, with sureties to be approved by such customs officer, conditioned that in case of condemnation of the articles so claimed the obligor shall pay all the costs and expenses of

the proceedings to obtain such condemnation, such customs officer shall transmit such claim and bond, with a duplicate list and description of the articles seized, to the United States attorney for the district in which seizure was made, who shall proceed to a condemnation of the merchandise or other property in the manner prescribed by law.

PROCEDURE AND ADMINISTRRTTION 26 USCS § 7325, n

RESEARCH GUIDE

Federal Procedure L Ed:
20 Fed Proc, L Ed, Internal Revenue §§ 48:1427, 48:1428.

RIA Coordinators:
Federal Tax Coordinator 2d, P V-4008.

INTERPRETIVE NOTES AND DECISIONS

I. IN GENERAL

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4. Effect of failure to appraise

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V. REMEDIES

10. Exclusive nature of remedy
11. Contesting seizure
12. Effect of other proceedings
13. Action for damages

I. IN GENERAL

1. Generally

Claimant of property seized by Treasury must file claim and execute bond within time specified in treasuries notice of seizure if he wishes to have his claim judicially determined; otherwise property will be forfeited. Epps v. Bureau of Alcohol, Tobacco & Firearms Dept. of Treasury (1974, CA6 Tenn) 495 F2d 1373.

Congress took away from executive officers power to mitigate forfeitures of property over prescribed amount [currently, $100,000] and gave it to court; intent was to require courts to exact proof of inquiries like those required by Treasury Department practice, and not to have one standard for vehicle worth requisite amount and another if worth a dollar more. United States v. One 1936

Model Ford-V-8 De Luxe Coach (1939) 307 US 219, 83 L Ed 1249, 59 S Ct 861, 22 AFTR 870.

2. Constitutionality

Predecessor to 26 USCS § 7325 is not unconstitutional because it deprives owner of property seized for forfeiture under internal revenue laws of any power to contest merits of seizure, whenever value of property is appraised at less than prescribed amount unless he posts required bond for costs. Colacicco v. United States (1944, CA2 NY) 143 F2d 410, cert den 323 US 763, 89 L Ed 611, 65 S Ct 116.

II. APPRAISAL

3. Generally

Where seized automobile is appraised as being worth less than requisite amount, that value must, be accepted by collector of internal revenue although owner offers proof that automobile is worth more than such amount. Application of Colacicco (1943, DC NY) 55 F Supp 766, affd (CA2 NY) 143 F2d 410, cert den 323 US 763, 89 L Ed 611, 65 S Ct 116.

4. Effect of failure to appraise

Appraisal of property by three appraisers is not prerequisite to declaration of forfeiture under 26 USCS § 7325, and such requirement is not jurisdictional; failure to

so comply does not render forfeiture nullity. Glup v. United States (1975, CA8 Neb) 523 F2d 557.

III. NOTICE

5. Generally

Where IRS scrupulously complied with requirements of predecessor to 26 USCS § 7325 in enforcing forfeiture of automobile allegedly used in connection with violation of revenue laws, claimant of ownership of such automobile cannot complain that he has not received personal notice of intended forfeiture. Re Certain Chevrolet Auto. (1942, DC NJ) 47 F Supp 843.

6. District for publication

26 USCS § 7325 requirement of publication in district where seizure was made in order to put owner of property on notice of potential forfeiture means that such notice should be made in "judicial district," and does not refer to "internal revenue district"; as to making claim within 30 days from date of first publication of notice, day of event after which designated period of time begins to run is not included and last day is included. Rush v United States (1958, CA10 Okla) 256 F2d 862, 58-2 USTC ¶ 15167.

IV. BOND

7. Generally

Property is not forfeited because bond was not executed until more than 6 months after final date fixed by Treasury's notice where value of seized property is

several times more than Treasury's claim and claimant filed his claim on time. Epps v Bureau of Alcohol, Tobacco & Firearms (1973, ED Tenn) 375 F Supp 345, affd without op (CA6 Tenn) 495 F2d 1373.

Receipt of claim. and cost bond constitutes notice to government that claimant intended to defend .forfeiture action against truck brought under 26 USCS § 7302. United States v One 1966 Chevrolet Pickup Truck (1972, ED Tcx) 56 FRD 459; 16 FR Serv 2d 1571, 27 ALR Fed 613.

8. Effect of failure to give bond

There may be administrative forfeiture of automobile in which tax-unpaid liquor is concealed when no bond is given. Fisburn v Jackson (1932, DC Tex) 55 F2d 934.

9. Exoneration of bond

Bond is not exonerated by fact that while forfeiture proceedings against automobile are pending, the automobile is again used in unlawful traffic intoxicating liquors and is forfeited for that offense. United States v. Stephens (1932, DC Fla) 1 F Supp 33.

V. REMEDIES

10. Exclusive nature of remedy

Procedure in predecessor to 26 USCS § 7325 is

§ 1343. Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42 [42 USCS § 1985];

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b) For purposes of this section---

(1) the District of Columbia shall be considered to be a State; and

(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. (June 25, 1948, ch 646, § 1, 62 Stat. 932; Sept. 3, 1954, ch 1263, § 42, 68 Stat. 1241, Sept. 9, 1957, P. L. 85-315, Part III, § 121, 71 Stat. §37; Dec. 29, 1979, P. L. 96'170, § 2, 93 Stat. 1284.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

This section is based on Act Mar. 3, 1911, ch 231, § 24, paras. 12, 13, 14, 36 Stat. 1092 (former 28 USC § 41 (12), (13), and (14). Words "civil action" were substituted for "suits," "suits at law or in equity" in view of Rule 2 of the Federal Rules of Civil Procedure. Numerous changes were made in arrangement and phraseology.

Amendments:

1954. Act Sept. 3, 1954, in paras. (1) and (2), substituted "1985 of Title 42" for "47 Of Title 8".

1957. Act Sept. 9, 1957, in the catchline, inserted "and elective franchise'', and added para. (4).

1979. Act Dec. 29, 1979 designated the existing provisions as subsec. (a); and added subsec. (b).

Other provisions:

Application of 1970 amendments. Act Dec. 29, 1970, P. L. 96-170, §3 Stat. 1284, provided: "The amendments made by this Act [amending this section and 42 USCS § 1983 and adding this note] shall apply

THE CODE OF THE LAWS OF THE UNITED STATES OF AMERICA

TITLE 42 - THE PUBLIC HEALTH AND WELFARE

CHAPTER 21. CIVIL RIGHTS

Section

[§§1981 & 1982 appear in the preceding volume]
1983. Civil action for deprivation of rights

[§§ 1984-2000h-6 appear in succeeding volumes]

Auto-Cites: annotations referred can further be researched through the Auto-Cite® Computer assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. (R. S. § 1979; Dec. 29, 1979, P. L. 96-170, § 1, 93 Stat. 1284.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

This section formerly appeared as 8 U.S.C. § 43. R.S. § 1979 was derived from Act Apr. 20, 1871, ch 22, § 1, 17 Stat. 13.

Supreme Court, U.S.
F I L E D
OCT 3 1995
CLERK

No. 95-370

In The

Supreme Court of the United States

October Term, 1995

MARGARET ATCHLEY,

Petitioner,

vs.

BILLY JACK SMITH and the
CITY OF POTEAU, OKLAHOMA,

Respondents.

**Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

RESPONDENTS' BRIEF IN OPPOSITION

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RULE 29.1 STATEMENT

Respondent City of Poteau, Oklahoma is a municipal corporation within the State of Oklahoma and has no parent company nor any corporate subsidiaries. Respondent Billy Jack Smith is an individual and exempt from the Rule 29.1 requirement.

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PETITIONER'S PRESENTATION OF APPELLATE QUESTION

Petitioner's "Question Presented" in her Petition for Writ of Certiorari is not an independently sufficient basis upon which this Court should grant *certiorari*. The "Question Presented" assumes facts not proven or offered by Petitioner in the underlying litigation. Thus, whether the "Question Presented" actually presents a question worthy of a grant of *certiorari* has no bearing on whether the case at bar should be reviewed by this Court. Here, *certiorari* should be denied.

RESPONDENTS' STATEMENT OF THE CASE

The Respondents, Officer Billy Jack Smith and the City of Poteau, Oklahoma accept Petitioner's Statement of the Case with the following additions and corrections.

Facts Relevant to Issues for Review

Petitioner is a 62-year-old female who owns a bar and resides in Poteau, Oklahoma. Respondent Billy Jack Smith is the Police Department Sergeant for Respondent City of Poteau, Oklahoma. Carla Belcher is a dispatcher for the Poteau Police Department and has experience as a jailer.

On October 28, 1991, at 2:00 a.m., Officer Smith stopped Petitioner's car at the intersection of Broadway and Parker in Poteau, a point near both the police station and Petitioner's residence. Smith made the stop because,

among other things, Petitioner was occupying two southbound lanes of traffic on Broadway. Petitioner was arrested for suspicion of driving under the influence of intoxicants ("DUI"), transporting a loaded firearm and possession of a controlled, dangerous substance.

At the police station, Petitioner was administratively handled by Officers Carla Belcher and W.R. Seale, II in connection with her DUI arrest and was observed during an alcohol deprivation period. The breathalyzer test administered to Petitioner tested 0.16, which is in excess of the maximum legal limit. Petitioner subsequently pled guilty to a reduced charge of reckless driving and paid a fine. The citation for transporting a loaded firearm was dismissed.

While Petitioner was being transported to the police station for her breathalyzer test, Sergeant Smith summoned a wrecker to tow away Petitioner's car. Prior to the arrival of the wrecker, Sergeant Smith conducted an inventory of Petitioner's car. The inventory revealed a tremendous quantity and variety of property within Petitioner's car. Among other things, currency and checks in the amount of $52,175.54 were discovered in the hatchback area of Petitioner's car during the inventory. $49,829.45 of the money discovered in the hatchback was in the form of U.S. currency. Petitioner's Brief acknowledges she was carrying pills wrapped in the cellophane from a cigarette wrapper at the time of her arrest. (Pet. Brf. at p. 10)

Sergeant Smith took the checks and currency to the police station to be counted for the inventory. Two Poteau Police Department employees assisted in counting. The

$52,175.54 in small bills and checks found in Petitioner's hatchback were separated by paperclipped scraps of paper with notations written upon the paper. Petitioner was given a document reflecting the final inventory tally of $52,175.54 at the completion of the inventory. All of the inventoried money in the form of checks was subsequently returned to Petitioner.

Petitioner was taken to the LeFlore County Jail under the DUI charge until she was sober. Some time later, Petitioner posted bond and was released from jail.

The currency was delivered to Detective Tamplin's custody after the inventory. The money was stored in the Poteau City Hall safe overnight. On the following day, October 29, 1991, the money was taken to the Poteau State Bank and deposited in the bank's vault.

The Poteau Police Department was aware of several law enforcement stops in the area where large amounts of currency were determined to have been drug related. Thus, on October 29, 1991, Oklahoma State Bureau of Investigations Agent Bob Almon was contacted. In turn, Agent Almon contacted the IRS and the DEA. Although the IRS conducted an extensive investigation, it ultimately declined to institute forfeiture proceedings.

Part of the DEA's investigation was to request the Poteau Police Department to use the Department's drug detection dog to see if the dog would positively identify the currency discovered in Petitioner's car as being tainted by narcotics. Indeed, the dog made a positive reaction to the currency and the DEA seized the currency on November 19, 1991. The DEA records indicate that it seized the entire $49,829.45.

The DEA properly provided Petitioner with notice of the seizure and forfeiture proceedings. The DEA transmitted the Notice of Seizure to Petitioner on December 16, 1991. (Resp. App. at 1) Petitioner acknowledged her receipt of the DEA Notice of Seizure on December 23, 1991. The DEA's Notice of Seizure was also published in the *USA Today* newspaper. At this point, Petitioner declined her opportunity to contest the DEA's forfeiture in a United States District Court. Rather, she chose to participate in the DEA's administrative forfeiture proceeding through her attorney.

The sole issue in the forfeiture hearing conducted by the DEA was the propriety of the DEA's seizure of the currency. The DEA entered its Declaration of Forfeiture on January 31, 1992.

Nature and Course of Proceedings

The District Court's disposition of this case followed the Respondents' Motions for Summary Judgment. Respondent Billy Jack Smith filed a separate Motion for Summary Judgment on November 15, 1993 requesting dismissal on the basis of his qualified immunity from suit. Petitioner's response disputed only the reason for her police stop on October 28, 1991, the location of her breathalyzer test and when her car was inventoried relative to her breathalyzer test. Respondent offered no other evidence to support her proffered "Uncontroverted Facts."

Respondents collectively filed a Motion for Summary Judgment on December 15, 1993 which was granted by the District Court's February 1, 1994 Order. Respondents'

Motion requested judgment from the District Court finding as a matter of law (1) the Respondents did not seize the currency discovered in the Petitioner's vehicle, (2) the Respondents did not forfeit the currency discovered in the Petitioner's car to the United States, (3) the seizure and forfeiture of the currency discovered in Petitioner's vehicle were beyond the control of the Respondents, and, (4) the Petitioner's claim is barred by collateral estoppel and/or *res judicata*.

Petitioner's Response Brief did not follow Fed. R. Civ. P. 56. The Respondents' statement of facts with supporting documents, testimony and affidavits were not controverted by Petitioner. Thus, Petitioner confessed the Respondents' statement of facts.

The District Court granted the Respondents' Motions on February 1, 1994. A review of the District Court's Order dismissing the instant case finds the court held that it was Petitioner's "election to challenge administrative forfeiture by petition for remission, rather than by posting a bond prior to judicial challenge" that bound Petitioner exclusively to the remedies available in the administrative proceedings. (Pet. for Cert. at p. 14a) In essence, the District Court held that a trial court could have assumed jurisdiction of the case and heard Petitioner's complaints concerning the alleged violations of her fourth and fifth amendment rights as a consequence of the seizure of the money found in her car. However, Petitioner's election to forego the judicial forum bound her to the remedies available within the administrative forum.

The Tenth Circuit Court of Appeals affirmed the District Court on June 5, 1995. The Tenth Circuit concurred with the District Court's conclusion that Petitioner's election to opt against a judicial forum for the forfeiture proceeding divested the District Court of jurisdiction to hear the allegations of constitutional rights violations. Thus, the corollary must also be true: the District Court sitting as a forum for a judicial forfeiture would have jurisdiction to conduct a plenary hearing of Petitioner's allegations attendant with the seizure and forfeiture of the money inventoried from her car. Significantly, Circuit Judge Henry's concurring opinion specifically found the Petitioner's DUI stop, arrest and search to have been "completely unremarkable – and constitutional." (Pet. Brf. at 9a)

SUMMARY OF ARGUMENT

The DEA investigated an incident where a large quantity of small denomination currency was discovered during an inventory of Petitioner's car subsequent to her lawful stop and arrest by the Respondents Sergeant Billy Jack Smith and the City of Poteau, Oklahoma. The DEA seized the currency and instituted forfeiture proceedings. Petitioner chose to contest the forfeiture through an administrative procedure by filing a Petition for Remission or Mitigation. Petitioner did not prevail and the currency was forfeited to the DEA. Petitioner did not appeal the forfeiture and it became final. Later, Petitioner brought 42 U.S.C. § 1983 claims against the Respondents alleging violations of her fourth and fifth amendment claims rights.

The Respondents filed a Motion for Summary Judgment noting that Petitioner had waived her right to bring the § 1983 claims. The District Court dismissed Petitioner's claim and held that it was divested of jurisdiction when Petitioner declined the opportunity to have her claims removed to a district court for a plenary hearing on the issues surrounding the forfeiture.

The Tenth Circuit Court of Appeals affirmed the District Court's dismissal. The Court of Appeals agreed that Petitioner had simply declined to exercise her right to pursue her § 1983 claims by failing to remove the proceedings to a district court. Moreover, Circuit Judge Henry specially noted that Petitioner's failure to contest the seizure in the proceeding designed expressly for that purpose was a serious mistake. However, after reviewing the record, Judge Henry also noted that Petitioner's § 1983 claims beyond the seizure and forfeiture would have arisen from a completely constitutional stop, arrest and search.

Here, Petitioner is essentially attempting to undo her previous waiver of her right to bring § 1983 claims against these Respondents. Summary judgment was proper where the law provided Petitioner with an opportunity to litigate her § 1983 claims in a district court. Summary judgment was also proper where the facts prove Petitioner had no viable § 1983 claim against these Respondents. Therefore, the Court should refuse to grant *certiorari*.

ARGUMENT AND AUTHORITY

Rulings by Lower Courts are Consistent

Petitioner argues that this case is complicated by a purported disparity in the bases for the District Court and circuit court's dismissal of this matter. However, a closer review of the District Court's February 1, 1994 Order and the Tenth Circuit's June 5, 1995 Order reveals both Orders to be consistent in their application of the law and facts of the case.

The District Court's Order initially notes that Petitioner had an opportunity for a plenary review before a District Court of the forfeiture and her several claims. However, in order to obtain the judicial forum, she was required to file a $250.00 bond.[1]

Thus, it was Petitioner's "election to challenge administrative forfeiture by petition for remission, rather than by posting a bond prior to judicial challenge" that bound Petitioner exclusively to the remedies available in the administrative proceedings. (Pet. for Cert. at p. 14a) In essence, the Order recognized that a District Court could have assumed jurisdiction of the case and heard Petitioner's allegations under 42 U.S.C. § 1983 concerning the seizure of the money found in her car. However, Petitioner's election to forego the judicial forum bound her to the remedies available within the administrative forum.

---

[1] The DEA's Notice of Seizure provides for *in forma pauperis* filing by indigent claimants and explains how to request a waiver of the bond. (Resp. App. at 3)

Petitioner argues that the Court of Appeals' dismissal is "on an entirely different ground" than the District Court. To this end, Petitioner claims that the Tenth Circuit found the relief and remedies available in the forfeiture action were inadequate. Petitioner's statement is correct only insofar as it applies to the relief and remedies available to Petitioner withinan administrative forfeiture proceeding. Here, however, Petitioner has taken the court's language out of context and applied it to a judicial forfeiture. Petitioner's non-contextual assertion is simply not supported by the Orders from which she claims to refer.

Quite to the contrary of Petitioner's assertion, the Court of Appeals' June 5, 1995 Order held that Petitioner had been given an opportunity to present the instant claims in a judicial forum. (Pet. for Cert. at p. 7a) In fact, the court specifically held that

> "Indeed, had she elected to pursue the forfeiture in District Court as she clearly had the right to do, there would have been no jurisdictional difficulties at all regarding her § 1983 claim."

(*Id.*) It was Petitioner's election to opt against a judicial forum for the forfeiture proceeding that foreclosed the right to challenge the seizure or the underlying conduct leading to the seizure in District Court. The Court of Appeals very succinctly addressed the issue upon which Petitioner seeks *certiorari* when it declared its concern "to ensure that a plaintiff who alleges a violation of constitutional rights *is not denied a forum* in which to do so." (emphasis added) (Pet. for Cert. at p. 6a)

Here, it is quite plain that Petitioner was not denied the forum in which to bring her constitutional rights

allegations. Rather, Petitioner could have elected to challenge the underlying forfeiture in a judicial forum and brought separate claims against the Respondents. It is precisely this election that divested the District Court of jurisdiction. Thus, the District Court and Tenth Circuit's Orders are in accord.

Haring v. Prosise not Dispositive

Petitioner next contends *Haring v. Prosise*, 462 U.S. 306, 103 S. Ct. 2368, 76 L. Ed. 2d 595 (1983) essentially rejects the District Court and Court of Appeals' decisions in the case at bar. However, Petitioner explains neither how *Haring* applies to the instant case nor how it is dispositive of the instant issue.

Haring v. Prosise was a review by this Court of the effect of a state criminal court defendant's opportunity to raise federal civil rights claims in a state criminal court trial. The primary issue addressed by the Court was whether a criminal defendant's guilty plea had a preclusive effect on a subsequent § 1983 claim arising out of the underlying fourth amendment issues. The *Haring* case turned on the opportunity the criminal defendant had been given in the criminal proceeding to litigate his § 1983 claim.

In *Haring*, the only issue raised in the criminal indictment was whether the defendant was guilty of the charge filed against him. Further, "none of the issues in the § 1983 action could have been 'necessarily' determined in the criminal proceeding." *Haring*, 462 U.S. at 316. Further still, a determination of the merits of the criminal defendant's § 1983 claim in the context of the guilty plea

proceeding "would have been entirely irrelevant." *Id.* Consequently, the *Haring* Court held that the criminal defendant's guilty plea had not afforded him with the opportunity to litigate his § 1983 claim.

In the case at bar, Petitioner was given a full and fair opportunity to litigate her claim in court. In fact, Petitioner was informed at the time of the DEA seizure that she had a right to have her claims brought in the forum of a district court. (Resp. App. at 1) However, Petitioner's own decision based upon the advice of counsel was to elect to pursue her claims in an administrative forfeiture proceeding.

Here, unlike in *Haring*, both the forfeiture proceedings and underlying § 1983 claims are civil in nature. Moreover, both the District Court and Tenth Circuit have acknowledged that Petitioner's § 1983 claims could have received a plenary hearing before a district court if the claims had been raised in a judicial forfeiture proceeding. Therefore, Petitioner was provided a forum and opportunity to litigate her § 1983 claims – she simply chose not to do so. The instant appeal is merely an attempt to undo her previous, binding election.

***Wilder v. Virginia Hosp. Ass'n* not Contrary to Tenth Circuit**

The other decision upon which Petitioner relies in her Petition is *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 110 S. Ct. 2510, 110 L. Ed. 2d 455 (1990). Petitioner's reliance on *Wilder* is also misplaced.

In *Wilder*, the Virginia Hospital Association sought declaratory and injunctive relief under 42 U.S.C. § 1983.

The petitioners in *Wilder* argued that the Hospital Association could not enforce a claim based upon the Boren Amendment to the Medicaid Act under § 1983. The Court noted that Congress must expressly preclude resort to § 1983 in order to abrogate a private reliance on § 1983 to enforce federally secured rights. *Wilder*, 496 U.S. at 520.

Here, it is not necessary for an administrative forfeiture under 26 U.S.C. § 7325 to provide Petitioner with the ability to assert her § 1983 claims. Rather, as the Tenth Circuit noted in the June 5, 1995 Order, Petitioner was given – and refused – an opportunity to bring her § 1983 in a plenary judicial forfeiture hearing. Thus, *Wilder* is distinguishable because the instant Petitioner was not precluded from asserting a § 1983 claim. To the contrary, Petitioner consulted an attorney and then elected to challenge the administrative forfeiture by petition for remission or mitigation in lieu of raising her § 1983 claims.

Petitioner's argument that *Wilder v. Virginia Hosp. Ass'n* is contrary to the Tenth Circuit's June 5, 1995 Order is premised on her conclusion that the Order requires a § 1983 action against state entities to "be preceded by a [26 U.S.C.] § 7325(3) suit." (Pet. for Cert. at p. 7) Here, it is not necessary for the Court to resolve Petitioner's stated issue because her stated issue is based upon a flawed premise. A closer review of the Order finds it does *not* hold that a § 1983 action against state entities must be preceded by a § 7325(3) suit. However, the Court of Appeals *does* note that Petitioner's election to not contest the seizure in the proceeding designed expressly for that purpose was fatal to her attempt to subsequently raise § 1983 claims. (Pet. for Cert. at p. 9a)

Petitioner's Stop, Arrest and Search Constitutional

Finally, Petitioner argues she is not now contesting the forfeiture of the money forfeited to the DEA; instead, she now frames her cause of action as a wrongful seizure by the Respondents. The law and facts do not support Petitioner's position.

It is important to note that Petitioner's initial stop, the inventory of her impounded car, the DEA's seizure of the money discovered in the inventory and the DEA's subsequent forfeiture are all interrelated. Both the District Court and Tenth Circuit were provided with an extensive record of the facts in this case. In fact, Circuit Judge Henry's concurring opinion specifically found the Petitioner's DUI stop, arrest and search to have been "completely unremarkable – and constitutional." (Pet. for Cert. at p. 9a) Further, it was never controverted that the DEA was the party who seized the money discovered in Petitioner's car. (Resp. App. at 1) Finally, Petitioner admits in her Brief that she may not now re-litigate the DEA's forfeiture of the money. (Pet. for Cert. at p. 8)

Respondents did not Seize or Forfeit Currency

The final issue Petitioner has apparently deemed worthy of a grant of *certiorari* is whether the Respondents violated her fourth amendment rights by seizing the money discovered in her car. Within this claim, Petitioner claims that the length of the detention is independently sufficient to state a § 1983 claim. However, Petitioner never controverted the fact that both the IRS and DEA

conducted investigations into the currency before the seizure occurred. Similarly, it must be recalled that Petitioner never controverted the fact that the DEA was the party who seized the money. (Resp. App. at 1)

Finally, it is significant to note that the "drug dog sniff" issue raised by Petitioner is not actually an issue. Here, it is uncontroverted that the Respondent City of Poteau's "drug dog" was only used at the request of the DEA. Further, it is uncontroverted that the Respondents took no action based upon the result of the dog's positive reaction to the currency. In sum, there is no evidence to support Petitioner's claim. Consequently, both the District Court and Tenth Circuit properly dismissed Petitioner's claims against the Respondents Billy Jack Smith and the City of Poteau, Oklahoma.

CONCLUSION

Petitioner was given an opportunity to bring her 42 U.S.C. § 1983 claims against the Respondents Billy Jack Smith and the City of Poteau, Oklahoma in a plenary hearing before a district court in a judicial review of the DEA forfeiture. Instead, Petitioner elected to file a Petition for Remission or Mitigation. Petitioner's choice to have her claims heard in an administrative forfeiture divested the District Court of jurisdiction to consider

Petitioner's § 1983 allegations. Here, the Court should deny *certiorari*.

Respectfully submitted,

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DEFENDANT'S
EXHIBIT "G"

[LOGO] **U.S. Department of Justice**

Drug Enforcement Administration

SEIZURE #: ILLEGIBLE CASE #: ILLEGIBLE
PROP: $49,829.45 U.S. CURRENCY

VALUE: $49829.45
SEIZURE DATE: 91 NOV 19
SEIZURE PLACE: POTEAU, OK

SID FROM: ATCHLEY, MARGARET K
OWNER:
JUDICIAL DIST: OKLAHOMA EASTERN
BOND REQUIRED: 34983
DATE OF THIS LETTER: 16 DEC 91
DATE OF FIRST PUBLICATION: 91 DEC 24

ATCHLEY, MARGARET M
109 DOWNEY
POTEAU
OK 74913

1088878

NOTICE OF SEIZURE

The above-described property was seized by Special Agents of the Drug Enforcement Administration (DEA) for forfeiture under Title 21, United States Code (U.S.C.), Section 881, because it was used or acquired as a result of a drug-related offense. (See Title 21, Code of Federal Regulations (C.F.R.), Section 1316.91(d) (54 Federal Register 37610-37611) for the definition of the term "drug-related offense.") The seizure date and place, as well as other pertinent information regarding the property are

also shown above. Pursuant to Title 19, U.S.C., Sections 1602-1619, and Title 21, C.F.R., Sections 1316.71-1316.81, procedures to administratively forfeit this property are under way. You may petition the DEA for the return of the property or your interest in it (remission or mitigation), and/or you may contest the seizure and forfeiture of the property in court. Also, under certain circumstances, you may petition for the expedited release of the property. You should review the following procedures very carefully.

TO REQUEST REMISSION OR MITIGATION OF THE FORFEITURE

If you want to request the remission (pardon) or mitigation of the forfeiture, submit a petition for remission or mitigation within thirty (30) days from your receipt of this notice. Follow the regulations set forth in Title 28, C.F.R., Sections 9.1-9.7. State the facts and circumstances which you believe justify return of the property or return of your interest in the property. File an original petition and two copies with the DEA's Asset Forfeiture Section. No bond is necessary if only a petition is filed. Pursuant to Title 28. C.F.R., Section 9.4(c), a petition for remission or mitigation of forfeiture shall be signed and sworn to by the petitioner.

TO CONTEST THE FORFEITURE

In addition to or in lieu of petitioning for remission or mitigation, you may contest the forfeiture of the seized property in UNITED STATES DISTRICT COURT. To do so, you must file a claim of ownership and cost bond with

the DEA. Submit the bond in the amount shown above in the form of a cashier's check or a certified check payable to the U.S. Department of Justice, or present satisfactory surety. *Claims must be signed by the parties making the claim.* Unsupported submissions signed by attorneys are insufficient to satisfy the requirement the claims be personally executed. *United States v. Fifteen Thousand Five Hundred Dollars,* 558 F.2d 1359, 1360 (9th Cir. 1977).

If you see indigent (needy and poor) you may not have to post the bond. To request a waiver of the bond, you must fully disclose your finances in a signed statement called a "Declaration in Support of Request to Proceed *In Forma Pauperis*" along with a claim of ownership of the property. Use the format of the *pauperis* declaration shown as Form 4 in the Appendix of Forms following Rule 48 of the Federal Rules of Appellate Procedure or obtain a form from a DEA field office. The claim of ownership, with either bond or the "Declaration in Support of Request to Proceed *In Forma Pauperis*" must be filed within *Twenty (20) days* of the *first date* of publication of the notice of seizure in the edition of the *USA Today* newspaper referenced above. The notice will be published three successive weeks.